

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

DONALD DOUGLAS BONE,

Petitioner,

v.

JOHN ASHCROFT, et al.,

Respondents.

No. C 05-0345 MMC (PR)

ORDER OF DISMISSAL

Donald Douglas Bone, a California prisoner proceeding pro se, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has paid the filing fee.

BACKGROUND

Petitioner is a Canadian citizen serving a sentence of 24 years in a California state prison following his conviction for one count of sexual abuse of a child and four counts of forced oral copulation. Petitioner seeks transfer to a prison in Canada pursuant to the Convention on the Transfer of Sentenced Persons, 35 U.S.T. 2867 ("Convention").¹ Petitioner alleges that his requests for transfer have been denied on the grounds that he had an outstanding restitution fine, and that he had lived in the United States for more than five years prior to his conviction. Petitioner alleges that he is being held in violation of a treaty of the United States,

¹ Both the United States and Canada are signatories to this multilateral agreement.

1 and that he has exhausted state judicial remedies regarding his claim.

2 DISCUSSION

3 A. Standard of Review

4 A district court may entertain a petition for writ of habeas corpus "in behalf of a person
5 in custody pursuant to the judgment of a State court only on the ground that he is in custody in
6 violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a);
7 Rose v. Hodges, 423 U.S. 19, 21 (1975).

8 A habeas petition may be dismissed summarily "[i]f it plainly appears from the face of
9 the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the
10 district court. . . ." Rule 4, Rules Governing Section 2254 Cases; Hendricks v. Vasquez, 908
11 F.2d 490, 491 (9th Cir. 1990). Summary dismissal is appropriate only where the allegations in
12 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. Id.
13 (quoting Blackledge v. Allison, 431 U.S. 63, 75-76 (1977)). In addition, 28 U.S.C. § 1915(d)
14 authorizes federal courts to dismiss a case filed in forma pauperis prior to service "if the
15 allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Under
16 this standard, a district court may review a petition and dismiss sua sponte claims that are
17 premised on meritless legal theories or clearly lacking any factual basis. Denton v. Hernandez,
18 504 U.S. 25, 32 (1992). Pro se pleadings must be liberally construed, however. Haines v.
19 Kerner, 404 U.S. 519, 520 (1972).

20 B. Legal Claim

21 Petitioner claims entitlement to transfer to Canada pursuant to the Convention. The
22 Convention provides: "If two or more Parties have already concluded an agreement or treaty
23 on the transfer of sentenced persons or otherwise have established their relations in this
24 matter, or should they in the future do so, they shall be entitled to apply that agreement or
25 treaty or to regulate those relations accordingly, in lieu of the present Convention."
26 Convention, supra, art. 22, ¶ 2. Canada and the United States did enter into an earlier
27 agreement regarding the transfer of prisoners, i.e., the Treaty Between The United States of
28 America and Canada on the Execution of Penal Sentences, March 2, 1977, 30 U.S.T. 6263

1 ("Treaty"). Although the Treaty predates the Convention, the Convention appears to defer to the
2 more specific Treaty. This court need not decide which of the two international agreements
3 applies, however, as petitioner's claims fail under either.

4 The Ninth Circuit considered and rejected a similar habeas claim under the U.S.-Canada
5 Treaty in Hogan v. Koenig, 920 F.2d 6 (9th Cir. 1990). There, a Canadian serving a term of 26
6 years to life in California state prison tried to compel state prison officials to adhere to the
7 language of the Treaty. The Ninth Circuit held that California was not bound by the Treaty's
8 language because it was not a party thereto. Id. at 8. As the Ninth Circuit observed, "California
9 has decided to cause [the prisoner] to serve his sentence where he committed his crime, and
10 not in his native land. California has the power to make such a decision, and the Treaty
11 expresses no limitations on the basis on which California may make that decision." Id.
12 Consequently, although federal prison officials may be subject to the Treaty, California state
13 prison officials are not so bound, and California is not required by the Treaty to transfer
14 petitioner to Canada.

15 The reasoning set forth in Hogan is equally applicable to the Convention, because
16 California likewise is not a party to the Convention. Accordingly, the Court concludes that the
17 Convention does not require California to transfer petitioner to Canada. Further, even if
18 California were a party to the Convention, petitioner's claim would fail. A prisoner has no
19 protected liberty interest in a transfer under the Convention because the decision as to whether
20 to transfer a prisoner is within the unfettered discretion of the Executive Branch. See
21 Bagguley v. Bush, 953 F.2d 660, 662 (D.C. Cir. 1991) (holding prisoner had no protected
22 liberty interest in transfer to home country under Convention, because neither Convention nor
23 implementing legislation placed any substantive limitations on official discretion). Thus, to
24 whatever extent the Convention applies to California, the State could not be compelled to
25 transfer petitioner because he has no due process right to such transfer.

26 In sum, petitioner's claim that he is being held in a California state prison in violation of
27 a treaty of the United States is without merit.
28

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is hereby
DISMISSED.

The Clerk shall close the file and terminate any pending motions.

IT IS SO ORDERED.

DATED: May 19, 2005

/s/ Maxine M. Chesney
MAXINE M. CHESNEY
United States District Judge